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PP v. EHSAN MOHD RANI

HIGH COURT MALAYA, SHAH ALAM
MEOR HASHIMI ABDUL HAMID JC
[CRIMINAL APPEAL NO: BA-42K-2-02-2018]
26 MARCH 2019

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CRIMINAL LAW: *Penal Code – Section 408 – Criminal breach of trust – Guilty plea – Mitigating circumstances – Appropriate sentence – Accused bound over to be of good behaviour – Whether sentence lawful and adequate*

C ***CRIMINAL PROCEDURE:*** *Sentence – Adequacy – Criminal breach of trust – Guilty plea – Minimum jail sentence prescribed by law – Whether trial judge could order accused to execute bond of good behaviour – Whether duty bound to impose prescribed sentence – Order of binding over hereof – Whether lawful – Whether appropriate – Penal Code, s. 408 – Criminal Procedure Code, s. 294*

D The 54-year-old accused in this case had pleaded guilty to a charge of criminal breach of trust under s. 408 of the Penal Code, and upon his conviction, was ordered to sign a bond of good behaviour for three years in the sum of RM9,000 in one surety under s. 294 of the Criminal Procedure Code ('CPC'). It was the view of the learned Sessions Court Judge ('SCJ'), in imposing the sentence, and invoking s. 294 CPC instead of the sentence E prescribed under s. 408 Penal Code – which is imprisonment of not less than one year and not more than 14 years, as well as whipping and fine – that the accused's antecedents, including the fact that he was suffering from 'gastrointestinal stromal tumours', justified the court to so release the accused on a bond of good behaviour. Dissatisfied, the Public Prosecutor appealed F and argued in essence that the sentence was inadequate and inappropriate, as a minimum jail sentence was mandated by the law. It was further argued that the sentence imposed did not reflect the seriousness of the offence and made light the importance and significance of public interest. The accused retorted that the application of s. 294 was permissible in the circumstances, and in G any case that the sentence was adequate and passed according to law.

Held (dismissing appeal; affirming SCJ's decision):

(1) The existence of a minimum sentence under s. 408 of the Penal Code did not deprive the court from exercising its discretion under s. 294 of H the CPC and this court agreed with the findings of the learned SCJ that this was a proper case to invoke s. 294 of the Penal Code. (para 39)

(2) This court was of the same opinion with the findings made by the learned SCJ that the health condition of the respondent ought to be given priority over other grounds. This court would further opined that, I enduring emotional turmoil and suffering physical pain from such illness in itself served as a 'punishment' for the respondent, and should be seen as a form of rehabilitating the respondent. When overwhelmed by remorse and penitence, that in itself could be construed as public interest had indeed been served and best served. (paras 20 & 29)

(3) The learned SCJ took into account the character, antecedents, plea of guilty, the respondent's health and the fact that the respondent was a first offender. Considering the reasons given by the SCJ, and the decisions in *Nor Afizal Azizan v. PP*, *PP v. Bahar Abu* and *Bhandulananda v. PP*, the learned SCJ had not fallen into any error of law or principle, and this court, therefore, would not interfere with the sentence passed. (paras 30, 32 & 36)

Case(s) referred to:
Bhandulananda Jayatilake v. PP [1981] 1 LNS 139 FC ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [2002] 3 CLJ 457 FC ***(refd)***
Nor Afizal Azizan v. PP [2012] 6 CLJ 370 CA ***(refd)***
PP v. Bahar Abu [2007] 4 CLJ 604 HC ***(refd)***
PP v. Govindnan Chinden Nair [1998] 2 CLJ 370 HC ***(refd)***
PP v. Jafa Daud [1981] 1 LNS 28 HC ***(refd)***
PP v. Loo Choon Fatt [1976] 1 LNS 102 HC ***(refd)***
R v. Sargeant [1974] 60 Cr App R 74 ***(refd)***
Rex v. Kenneth John Ball [1951] 35 Cr App R 164 ***(refd)***
Zaidon Shariff v. PP [1996] 4 CLJ 441 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 173(b), 294
Penal Code, ss. 173(b), 408

Other source(s) referred to:
Criminal Litigation Process, Sweet & Maxwell, 3rd edn, p 538

For the prosecution - Mohd Raimi Mohd Ramli; DPP
For the respondent - Izleen Ismail; M/s Izleen

Reported by Wan Sharif Ahmad

JUDGMENT

Meor Hashimi Abdul Hamid JC:

Background

[1] This is an appeal by the Public Prosecutor on the sentence imposed on the respondent by the learned Sessions Court Judge (SCJ) under s. 294 of the Criminal Procedure Code (CPC). The respondent (Ehsan bin Mohd Rani) in this case was charged under s. 408 of the Penal Code for criminal breach of trust, an offence punishable with imprisonment for a term which shall not be less than one year and not more than 14 years and with whipping, and shall also be liable to fine.

[2] The respondent pleaded guilty to the said charge and was convicted and sentenced to a three-year good behaviour bond of RM9,000 with one surety pursuant to s. 294 of the CPC.

[3] The appellant had appealed against the sentence on the grounds that the sentence imposed by the learned SCJ was manifestly inadequate and did not take into consideration the minimum imprisonment of one year provided under s. 408 of the Penal Code. In addition, the appellant also contended that the learned SCJ had also failed to evaluate pertinent factors before applying s. 294 of the CPC.

The Charge

[4] For ease of reference, the charge proffered against the respondent is reproduced herein as follows:

> Bahawa kamu pada 27 Jun 2016 hingga 8 September 2016 di Syarikat Camp Five Sdn Bhd beralamat di E2501, Level 5, One Utama Shopping Centre, Bandar Utama 47800 Petaling di dalam Daerah Petaling, di dalam Negeri Selangor Darul Ehsan, sebagai Eksekutif Kewangan yang diberikan penguasaan ke atas harta iaitu wang hasil kutipan jualan syarikat yang berjumlah RM211,246.68 dan dengan curangnya kamu telah melakukan pecah amanah jenayah berkenaan terhadap harta tersebut dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 408 Kanun Keseksaan.

Facts Of The Case

[5] The facts of the case as admitted by the respondent is reproduced herein in *verbatim* as follows:

> (1) Pengadu, Mr. Jeremy Nathan Peet yang merupakan Pengarah Syarikat Camp Five Sdn Bhd telah membuat satu repot polis pada 10 September 2016 terhadap eksekutif kewangannya yang bernama Ehsan bin Mohd Rani (OKT). Laporan polis pengadu adalah sebagaimana Damansara Report 012854/2016.
>
> (2) Pengadu menyatakan bahawa OKT bekerja sebagai Eksekutif Kewangan di syarikat tersebut. Syarikat Camp Five Sdn Bhd menjalankan perniagaan berhubung dengan sukan memanjat.
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> (3) Pengadu menyatakan tugas OKT adalah untuk menguruskan kesemua kerja yang berkaitan dengan kewangan dan perbankan. OKT juga ditugaskan untuk menerima wang hasil jualan syarikat daripada juruwang, menyelia akaun bank syarikat dan memasukkan wang hasil jualan syarikat ke dalam akaun bank milik syarikat.
>
> (4) OKT telah mula bekerja di syarikat tersebut bermula 24 Mei 2010 sehingga 13 September 2016.
>
> (5) Pengadu menyatakan bahawa mengikut prosedur syarikat, penyelia syarikat akan menyerahkan wang hasil jualan syarikat kepada OKT. OKT kemudiannya akan merekodkan setiap wang hasil jualan tersebut dan memasukkannya di dalam peti simpanan wang yang disediakan. Setelah itu, setiap minggu OKT perlu ke bank untuk memasukkan wang-wang hasil jualan yang diterimanya tersebut ke dalam akaun bank syarikat.

(6) Pengadu menyatakan wang-wang hasil jualan tersebut perlu dimasukkan ke dalam akaun Maybank.

(7) Pengadu menyatakan bahawa mengikut semakan yang dilakukan terhadap rekod jualan syarikat, (Daily Collection Summary) didapati sejak 27 Jun 2016 hingga 8 September 2016, OKT tidak memasukkan wang hasil jualan syarikat ke dalam akaun bank syarikat. Jumlah yang tidak dimasukkan adalah sebanyak RM211,246.68.

(8) Pengadu mengatakan hanya OKT seorang yang bertanggungjawab untuk memasukkan wang hasil jualan syarikat ke dalam akaun bank syarikat. OKT juga mempunyai kombinasi kod untuk membuka peti besi dan mengambil serta mengira duit yang dimasukkan oleh petugas harian.

(9) OKT telah ditangkap oleh pihak polis pada 26 Oktober 2017 sebagaimana Petaling Jaya Report 014730/2016.

(10) Hasil siasatan polis mendapati rekod jualan syarikat menunjukkan wang kutipan hasil jualan tetapi rekod jualan syarikat menunjukkan wang-wang tersebut tidak dimasukkan ke dalam akaun bank syarikat.

(11) OKT sebagai seorang Eksekutif Kewangan di syarikat tersebut telah diamanahkan atau mempunyai penguasaan ke atas wang hasil jualan syarikat dalam kapasitinya sebagai Eksekutif Kewangan telah melakukan pecah amanah jenayah apabila tidak memasukkan wang-wang tersebut ke dalam akaun bank syarikat. Oleh yang demikian, OKT telah melakukan satu kesalahan di bawah s. 408 Kanun Keseksaan.

Section 408 Of The Penal Code

[6] Section 408 of the Penal Code provides as follows:

Criminal breach of trust by clerk or servant

Whoever being a clerk or servant, or employed as a clerk or servant, and being in any manner entrusted in such capacity with property, with any dominion over property, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for a term which shall not be less than one year and not more than fourteen years and with whipping, and shall also be liable to fine.

Ingredients Of The Charge

[7] Before this court goes any further, let's look at the ingredients of the charge. *Ratanlal & Dhirajlal's Law of Crimes, A Commentary on The Indian Penal Code 1860,* 27th edn states the ingredients of a charge under s. 408 of the Penal Code are as follows:

(i) the accused must be a clerk or servant;

(ii) he must have been entrusted with property, or with dominion over property; and

(iii) he must have committed criminal breach of trust in respect of such property.

[8] In this present case, this court found that all the elements of the above were not argued nor disputed by the respondent as the respondent had pleaded guilty at the earliest opportunity. The issue before this court is only on the sentence imposed by the learned SCJ.

Plea Of Guilty By The Respondent

[9] It was presented before this court that pursuant to s. 173(b) of the CPC, the charge was read and explained to the respondent. And that the respondent, having understood the nature and consequences of pleading guilty, had eventually pleaded guilty to the charge. Further, when the facts of the case were read and explained to him, the respondent then admitted the facts of the case and also the exhibits tendered by the prosecution. The plea of guilty and admission to the facts and exhibits was admitted by the respondent, without qualification.

[10] The learned SCJ, upon being satisfied with the respondent's plea of guilty, without qualification, then convicted and sentenced the respondent to a three year good behaviour bond of RM9,000 with one surety under s. 294 of the CPC.

Section 294 Of The CPC

[11] Section 294 of the CPC provides as follows:

> **First Offenders**
>
> When any person has been convicted of any offence before any Court if it appears to the Court that regard being had to the character, antecedents, age, health or mental condition of the offender or to the trivial nature of the offence or to any extenuating circumstances under which the offence was committed it is expedient that the offender be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond with or without sureties and during such period as the Court may direct to appear and receive judgment if and when called upon and in the meantime to keep the peace and be of good behaviour.

Appeal On Sentence

Appellant's Submission

[12] The Deputy Public Prosecutor ("DPP") submitted that the sentence of good behaviour bond under s. 294 of the CPC is manifestly inadequate and does not reflect the seriousness of the offence and also the importance of public interest. It was further argued that the sentence imposed had given preference to the interest of the respondent by putting undue importance to his deteriorating health. As such, it appears that the interest of respondent has outweighed the public interest.

[13] The learned DPP also submitted that the learned SCJ had not taken into account the minimum one year imprisonment as provided in s. 408 of the Penal Code. The learned DPP had put forth that since the minimum imprisonment is mandatory, it was not appropriate for the learned SCJ to release the respondent on a bond of good behaviour.

Respondent's Submission

[14] Learned counsel for the respondent submitted that the learned SCJ has duly and rightly considered the mitigation factors submitted by the respondent and has not committed any errors when sentencing the respondent. It was contended that the sentence imposed by the learned SCJ is within and in accordance with the law as provided in s. 173(b) of the CPC and hence, the application of s. 294 of the CPC is permissible based on the ground of the health of the respondent.

Sentence According To Law

[15] In *Public Prosecutor v. Jafa Daud* [1981] 1 LNS 28; [1981] 1 MLJ 315, Mohamed Azmi J (as His Lordship then was) observes as follows:

> A "sentence according to law" means that the sentence must not only be within the ambit of the punishable section, but it must also be assessed and passed in accordance with established judicial principles. In assessing sentence, one of the main factors to be considered is whether the convicted person is a first offender. It is for this purpose that before passing sentence, a Magistrate is required to call for evidence or information regarding the background, antecedent and character of the accused.

[16] On the same principle, Augustine Paul JC (as His Lordship then was) in *Zaidon Shariff v. Public Prosecutor* [1996] 4 CLJ 441 held:

> The phrase "pass according to law" in the subsection adverted to means that the sentence imposed must not only be within the ambit of the punishable section but it must also be assessed and passed in accordance with established judicial principles (see *Re Chong Cheng Hoe & Ors* [1966] 2 MLJ 252, *PP v. Jafa bin Daud* [1981] 1 MLJ 315 and *Phillip Lau Chee Heng v. PP* [1988] 3 MLJ 107). The right to determine the quantum of punishment on a guilty party is absolutely in the discretion of the trial court. It will exercise that power judicially and will not tolerate any encroachment or even semblance of encroachment by either the prosecution or the defence in respect of that right.

Principles Of Sentencing

[17] The principles of sentencing have long been entrenched and well settled in our criminal law jurisprudence. Raja Azlan Shah Ag. LP (as His Majesty then was) in *Bhandulananda Jayatilake v. Public Prosecutor* [1981] 1 LNS 139; [1982] 1 MLJ 83 had provided the following guidelines:

A Is the sentence harsh and manifestly excessive? We would paraphrase it in this way. As this is an appeal against the exercise by the learned judge of a discretion vested in him, is the sentence so far outside the normal discretionary limits as to enable this court to say that its imposition must have involved an error of law of some description? I have had the occasion to say elsewhere, that the very concept of judicial discretion
B involves the right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. That is quite inevitable. Human nature being what it is, different judges applying the same principles at the same time in the same country to similar facts may sometimes reach different conclusions (see *Jamieson v. Jamieson*).

C It is for that reason for some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; whilst others equally conscientious have thought it their duty to view the same crimes with leniency. Therefore sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. It is for that
D reason also that this court has said it again and again that it will not normally interfere with sentences, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient, *per se*, to warrant this court's interference.

For a discretionary judgment of this kind to be reversed by this court, it
E must be shown to our satisfaction that the learned judge was embarking on some unauthorised or extraneous or irrelevant exercise of discretion. We are far from convinced that any criticism of the learned judge is warranted. He took the course he did, in outweighing the plea of mitigation in favour of the public interest with a desire to uphold the dignity and authority of the law as administered in this country. We
F agree. That must receive the greatest weight. It is a serious offence to give false testimony, for it is in the public interest that the search for truth should, in general and always, be unfettered. The courts are the guardian of the public interest.

[18] On the same principle, Hashim Yeop A. Sani J (as His Lordship then
G was) in *Public Prosecutor v. Loo Choon Fatt* [1976] 1 LNS 102; [1976] 2 MLJ 256 decided:

The principles to be applied in imposing sentence however are the same in every case. The High Court sitting in exercise of its revisionary powers will not normally alter the sentence unless it is satisfied that the sentence
H of the lower court is either manifestly inadequate or grossly excessive or illegal or otherwise not a proper sentence having regard to all the facts disclosed on the record or to all the facts which the court ought to take judicial notice of, that is to say, that the lower court clearly has erred in applying the correct principles in the assessment of the sentence. It is firmly established practice that the court will not alter a sentence merely
I because it might have passed a different sentence … One of the main considerations is the assessment of sentence is of course the question of public interest …

[19] In *Dato' Seri Anwar Ibrahim v. PP* [2002] 3 CLJ 457; [2002] 3 MLJ 193, Mohamed Dzaiddin CJ, states as follows:

> It is of the upmost importance to stress here that the appellate court will not normally alter sentence unless it is satisfied that the sentence passed by the lower court is manifestly inadequate or excessive or illegal or otherwise not a proper sentence having regard to all the facts disclosed or that the court has clearly erred in applying correct principles in the assessment of sentence, see *PP v. Loo Choon Fatt* [1976] 2 MLJ 256.

The Learned SCJ's Grounds Of Judgment

Respondent's Deteriorating Health

[20] The learned SCJ had taken into account all relevant considerations before coming to the decision. Among others, elements of the respondent's background, respondent's deteriorating health, the respondent's guilty plea, public interest, and other relevant factors were evaluated before arriving at her decision. This court is of the same opinion with the findings made by the learned SCJ in that the health condition of the respondent ought to be given priority over other grounds.

[21] It was submitted that the respondent at the time of committing the offence was 54 years of age, married, and was the sole breadwinner for his family of five children with three among them were still dependent on him. It was further submitted by the counsel that the respondent was diagnosed as suffering from gastric gastrointestinal stromal tumour (malignant) and four corroborating medical reports were tendered by the counsel to be considered by the learned SCJ. The medical reports tendered by the respondent to support the respondent mitigation plea were as follows:

(i) Medical report dated 11 August 2017 issued by Dr Tee Sze Chee from Sungai Buloh Hospital;

(ii) Medical report dated 8 September 2017 issued by Dr Tee Sze Chee from Sungai Buloh Hospital;

(iii) Medical report dated 10 October 2017 issued by Dr Alagu Manthiram from Department of Radiotheraphy & Oncology, Kuala Lumpur General Hospital; and

(iv) Medical report dated 9 January 2018 issued by Dr Shanti Nadarajan, clinical specialist, Department of Radiotheraphy & Oncology, Kuala Lumpur General Hospital.

[22] On the issue of whether the respondent's state of health was a valid and strong mitigating factor, the learned SCJ had stated in her grounds of judgment as follows:

> The court has the right and duty to decide whether to be lenient or severe dan di dalam kes ini adalah tidak wajar untuk menjatuhkan satu hukuman yang severe iaitu memenjarakan ataupun mengenakan sebatan kepada OKT. Mahkamah berpendapat walaupun kesalahan ini adalah satu

A kesalahan yang serius tetapi in the circumstances mengambil kira kesihatan OKT yang meruncing dan OKT is induced to turn from criminal ways to honest living sejak 2015 kerana tidak melakukan kesalahan yang lain maka mahkamah berpendapat adalah sejajar dengan kepentingan awam jika OKT diberi satu hukuman bon berkelakuan baik di bawah seksyen 294 Akta 593.

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(see p. 22 appeal record vol. 1)

[23] Similarly, on the then deteriorating health of the respondent, the learned SCJ in her judgment further states as follows:

C Secara lazimnya satu hukuman pemenjaraan yang berat adalah wajar di dalam kes ini tetapi Mahkamah mendapati an eye for an eye and a tooth for a tooth bukanlah hukuman yang sesuai untuk dijatuhkan terhadap OKT kerana penyakit yang dialami olehnya bukanlah penyakit seperti kencing manis atau darah tinggi tetapi tumour. Penyakit ini adalah suatu penyakit yang serius dan peratus penyembuhan adalah minima. Kesakitan, keperitan dan sengsara yang ditanggung oleh OKT akibat penyakit tumour tersebut jelas kelihatan dari raut mukanya serta bentuk fizikal susuk badannya yang telah kurus sejak pertengahan 2017.

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(see p. 23 appeal record vol. 1)

[24] The learned SCJ after giving due consideration to the medical reports E of the respondent later concluded by stating:

Daripada penelitian kesemua laporan di atas, mahkamah mendapati OKT telah mulakan rawatan pada Julai 2017 dan menghadirkan diri untuk rawatan susulan setiap bulan. Diagnosa yang didapati oleh Oncology Team adalah malignant gastric GIST (gastointestinal stromal tumour) with duodenal extension dan ini adalah satu penyakit yang serius. Mahkamah mendapati laporan ini menyokong rayuan OKT yang dia menghadapi satu penyakit yang serius dan perlu mengambil rawatan susulan dari hospital.

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Dengan izin, health is wealth. And in this instance the OKT has lost his health. The agony and pain of enduring such deadly illness inevitably affects deeply the physical, emotional, mental and the spiritual realms of the OKT's life. Hence when sentencing, this court will not act in vengeance and inhumanely roll out the wheel of injustice upon a sick man stricken with cancer. Thus, this is an appropriate case for the court to use its discretionary powers on sentencing sparingly, leniently and temper justice with mercy.

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(see p. 26 appeal record vol. 1)

Respondent's Guilty Plea

[25] The learned SCJ also took into account the respondent's guilty plea I which had saved the court's time and expenses. In *Public Prosecutor v. Govindnan a/l Chinder Nair* [1998] 2 CLJ 370; [1998] 2 MLJ 191, Augustine Paul JC (as His Lordship then was) decided:

It is generally accepted that an accused person should be given credit or discount for pleading guilty (see *PP v. Ravindran & Ors* [1983] 1 MLJ 45. However, as I had the occasion to observe in *Zaidon Shariff v. PP* [1996] 4 CLJ 441 at p 446:

… Be that as it may, this rule is not strict rule as the court may, in the exercise of its discretion, refuse to grant any discount in appropriate case (see *Lee Say & Ors v. PP* [1985] 2 CLJ 155). In my opinion, a guilty plea ought to be considered in favour of the accused only when all other factors and circumstances surrounding the commission of the offence justify such a consideration …

[26] On the respondent's guilty plea, the learned SCJ in her grounds of judgment states as follows:

Mahkamah telah mengambil kira pengakuan salah OKT dan mendapati pengakuan salahnya telah membantu untuk melupuskan kes yang didaftar pada tahun 2016 tersebut dengan awal pada tahun ini. Ini telah menjimatkan masa dan kos mahkamah serta saksi. Mahkamah mendapati walaupun kes ini adalah satu jenayah serius tetapi bukanlah so heinous that a plea of guilty need to be given little or no weight. Setelah mahkamah mengimbangi fakta kes bahawa kesalahan yang dilakukan oleh OKT adalah satu kesalahan yang serius tetapi bukan heinous, keadaan kesihatan OKT, pengakuan salah dan sebagai pesalah pertama, mahkamah mendapati hukuman tersebut adalah satu hukuman yang wajar dalam kes ini.

Bond Of Good Behaviour

[27] In the appeal before this court, it is imperative to evaluate whether the good behaviour bond is proportionate to the offence committed by the respondent. It is a trite principle that an appellate court will not interfere with the sentence passed by the lower court. As such, this court will only consider whether the pertinent factors upon which the decision was based upon were appropriate and fitting to the circumstances of the crime committed by the respondent.

[28] In this appeal, the respondent's health condition requires continuous medical check-up as reflected in the medical report tendered by his counsel. The respondent was diagnosed with gastrointestinal stromal tumour and has since been advised to undergo continuous monthly follow-up. It should be noted that the respondent's deteriorating health condition then was the main consideration in the decision by the learned SCJ.

[29] This court agrees with the decision of the learned SCJ in exercising her discretion in not sentencing the respondent to prison but instead subjected the respondent to an order of good behaviour bond under s. 294 of the CPC. This court opines that enduring emotional turmoil and suffering physical pain from such an illness may in itself serve as 'punishment' for the respondent and forthwith be seen as a form of rehabilitating the respondent.

Further, it will not be too far off to construe that when overwhelmed by remorse and penitence, that in itself can be construed as public interest has indeed been served and best served.

[30] This view is taken based on the same principle observed in *Nor Afizal Azizan v. Public Prosecutor* [2012] 6 CLJ 370, when Raus Sharif PCA (as His Lordship then was) held:

> At this juncture, we would like to clarify the misconception on the applicability of s. 294 of the CPC. We would like to point out that the orders made under s. 294 of the CPC do not exonerate the person of the offence that he had committed. The person is in fact convicted of the offence and the conviction will be recorded and will form part of the person's criminal record and will remain there for the rest of that person's life. The effect of such an order was clearly spelled out in the case of *Jayanathan v. PP* [1973] 1 LNS 56, wherein Ong Hock Sim FJ held that:
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> > This section vests the Court before which a person is convicted with power to suspend sentence for such period as the Court may direct, and, if the offender behaves himself during such period, he would escape punishment for his offence.
> >
> > If he fails to observe the conditions of his bond, he would be liable to be apprehended and dealt with for his original offence.
>
> Thus, in the instant case, the appellant was in effect given a suspended prison sentence. He has to behave himself for a period of five years. If he behaves himself during the five years period, he would escape punishment for the offence but if he fails to observe the conditions of his bond, he will then be arrested and dealt with for the original offence of rape. Like the learned SCJ, we are hopeful that the suspended sentence would give the appellant another chance in life and that he will "turn over a new leaf". If the order of the suspended prison sentence has the effect of rehabilitating him, then public interest has indeed been served and best served.

[31] In *Public Prosecutor v. Bahar Abu* [2007] 4 CLJ 604; [2007] 8 MLJ 219, Nallini Pathmanathan JC (as Her Ladyship then was) observes as follows:

> Can a good behaviour bond be imposed where the penalty prescribed by law is mandatory sentence of imprisonment? It would appear so.
>
> In *PP v. Idris* [1955] MLJ 234, Thomson J (as he then was) advised magistrates that s. 294 of the CPC was only applicable in the case of offences punishable with imprisonment. This was subsequently extended to include offences which prescribed alternative punishments in *PP v. Yeong Yin Choy* [1976] 2 MLJ 267. However, it is implicit in these decisions that s. 294 of the CPC may be utilised whether the terms of sentence prescribed use the mandatory form "shall be punished" or otherwise.
>
> Similarly in *PP v. Lim Hong Chin* [1993] 3 MLJ 7336, this issue, ie, whether s. 294 of the CPC could be utilised where alternative forms of punishment were provided for, was considered. The offence committed was under s. 414 of the PC, which like s. 411 of the PC, provides for the alternative punishments of imprisonment or fine or both but when the stolen

property is a motor-vehicle or a component part, the section prescribes that the offender "… shall be punished with imprisonment for a term of not less than six months and not more than seven years and shall also be liable to fine …" In that case, the magistrate had released the offender on a good behaviour bond. Chong Siew Fai J followed the decision in *PP v. Yeong Yin Choy* [1976] 2 MLJ 267 and held that the provisions of s. 294 of the CPC are applicable where the offence prescribes alternative forms of punishment.

Again it is implied in this decision that even in cases where there is a mandatory requirement for imprisonment, s. 294 of the CPC can still be utilised by a court in dealing with an offender. And in *Winston Rajah v. PP* [1999] 1 CLJ 315, Richard Malanjum J (as His Lordship then was) stated in the course of his judgment that he had no reason to doubt the correctness of the contention that "… the existence of a minimum sentence does not deprive this court from exercising its discretion under s. 294 of the CPC."

… In *PP v. Kandasamy a/l Muniandy*, Dato' Zaharah Ibrahim J (as Her Lordship then was) considered the exact issue that is before this Court and came to the conclusion that the provisions of s. 294 of the CPC were not ousted by s. 411 of the PC, after examining *inter alia*, the decisions of the Supreme Court in *PP v. Mohamed Nor & Ors* [1985] 2 MLJ 200 and *Nordin Yusmadi v. PP* [1997] 3 MLJ 754.

… In view of the decisions of the Court of Appeal and Supreme Court in the aforesaid cases, as well as the existence of express exclusionary sections in the Penal Code where s.173A and s. 294 of the CPC are not to be used, it would appear that notwithstanding the mandatory nature of the provisions of imprisonment provided under s. 411 of the PC, it is open to the magistrate to deal with such an offender under s. 294 of the CPC. Therefore in the instant case, the learned magistrate did not fall into error when dealing with the respondent under s. 294 of the CPC in respect of an offence under s. 411 of the PC.

[32] Section 294 of the CPC requires that regard be had *inter alia*, to the character, antecedents, age, health or mental condition of the offender; or the trivial nature of the offence or to any extenuating circumstances under which the offences were committed. From the observation made by this court, the learned SCJ took into account the character, antecedents, plea of guilty, first offender and health of the respondent. From the learned SCJ's judgment, the deteriorating health of the respondent then was given the utmost consideration by the learned SCJ in justifying the order of bond of good behaviour under s. 294 of the CPC.

First Offender And No Previous Convictions

[33] The learned SCJ has also considered the fact that the respondent was a first offender and has no previous convictions in sentencing the respondent. This was reflected in the grounds of judgment of the learned SCJ produced here in *verbatim* as follows:

> OKT merupakan pesalah kali pertama dan tidak pernah disabitkan dengan sebarang kesalahan jenayah sebelum ini. Faktor ini merupakan salah satu faktor mitigasi yang telah dipertimbangkan oleh mahkamah. Di dalam kes *PP lwn. Karthiselvam a/l Vengatan* [2008] 3 MLJ 368, mahkamah telah memutuskan bahawa adalah tidak syak lagi bahawa undang-undang menghendaki pesalah pertama dikendalikan secara berlainan dengan pesalah-pesalah yang mempunyai rekod sabitan kesalahan yang lalu. Sekiranya tidak, proses penghukuman akan bersifat mekanikal. Mahkamah ini mengambil maklum yang terdapat plethora of cases yang telah memutuskan seseorang pesalah pertama tidak harus dihantar ke penjara dengan sewenang-wenangnya tetapi menjatuhkan satu hukuman berbentuk rehabilitasi contohnya di bawah seksyen 294 Akta 593 seperti yang diputuskan dalam kes termasyhur *PP v. Winston Raja* [1999] 1 CLJ 315.

(see p. 27 appeal record vol. 1)

Appellate Intervention On Sentence

[34] After considering the reasons given by the learned SCJ, this court does not intend to disturb the findings by the learned SCJ on the sentence imposed on the respondent based on the principles decided in the case of *Dato' Seri Anwar Ibrahim v. PP* [2002] 3 CLJ 457; [2002] 3 MLJ 193 where the Federal Court held:

> It is of the utmost importance to stress here that the appellate court will not normally alter the sentence unless it is satisfied that the sentence passed by the lower court is manifestly inadequate or excessive or illegal or otherwise not a proper sentence having regard to all the facts disclosed or that the court has clearly erred in applying correct principles in the assessment of sentence.

(see *Bhandulananda Jayatilake v. PP* [1981] 1 LNS 139; [1982] 1 MLJ 83, *PP v. Loo Choon Fatt* [1976] 1 LNS 102; [1976] 2 MLJ 256, *PP v. Jafa Daud* [1981] 1 CLJ 28; [1981] 1 MLJ 315, *R v. Sargeant* [1974] 60 Cr App R 74 dan *Rex v. Kenneth John Ball* [1951] 35 Cr App R 164).

[35] This court is satisfied that the imposition of a good behaviour bond by the learned SCJ has not occasioned an error of principle or law. This court also concurs with the principles set out in the decision in the case of *Bhandulananda Jayatilake v. Public Prosecutor (supra)* where, *inter alia*, it acknowledged that sentences do vary in apparently similar circumstances as each case is decided by the wisdom of different judge.

[36] Thus for the very same reason, this court too will not interfere with the decision and sentence by the learned SCJ in spite of the possibility or even the probability, that another court would have imposed a different sentence. Further, this court is satisfied that the learned SCJ was not embarking on some unauthorised or extraneous or irrelevant exercise of discretion.

[37] This court agrees with the decision by Lawton LJ in *R v. Sargeant* [1974] 60 Cr App R 74 which opines that any judge who comes to sentencing an offender, ought always to have these four classical principles ie, retribution, deterrence, prevention and rehabilitation, in mind and to apply them to the facts of the case to see which of them has the greatest importance in the case with which he is dealing.

[38] In furtherance to the above, this court is of the opinion that the learned SCJ gives paramount consideration to the deteriorating health of the respondent for a rehabilitative sentence which intends to afford the respondent an opportunity of starting anew, and is imposed usually for first offenders. As decided in *R v. Ball* [1951] 35 Cr App R 164, Hilbery J observed that "the public interest is best served, if the offender is induced to turn from criminal ways to honest living". This suggests a rehabilitative aim.

(see *Criminal Litigation Process* Sweet & Maxwell, 3rd edn, p. 538)

[39] The existence of a minimum sentence under s. 408 of the Penal Code does not deprive the court from exercising its discretion under s. 294 of the Criminal Procedure Code and this court agrees with the findings of the learned SCJ that this is a proper case to invoke s. 294 of the CPC.

Conclusion

[40] In the upshot, based on the above-said reasons, the appeal by the appellant is hereby dismissed. The order of good behaviour bond under s. 294 of the CPC imposed by the learned SCJ is hereby affirmed.